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88-138

Supreme Court, U.S.
FILED
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CLERK

NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES S. LIBERIS, DAVID L. FLEMING,
AND CHARLES S. LIBERIS, P.A.,

Petitioners,

versus

D. BROWARD CRAIG, TRUSTEE IN BANKRUPTCY
FOR DAVID A. CRABTREE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Article I Court has the power to award attorneys' fees incurred on appeal from a contempt order of that Court?

2. Whether an attorney who has been held in contempt is entitled to have sanctions adjudicated before a judge other than the one who has held him in contempt?

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NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES S. LIBERIS, DAVID L. FLEMING,
AND CHARLES S. LIBERIS, P.A.,

Petitioners,

versus

B. BROWARD CRAIG, TRUSTEE IN BANKRUPTCY
FOR DAIVD A. CRABTREE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Charles S. Liberis, David L. Fleming, and Charles S. Liberis, P.A., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals entered in the above-entitled proceeding on April 25, 1988, affirming a judgment entered by the United States District Court for the Eastern District of Tennessee on February 3, 1987.

OPINIONS BELOW

The Bankruptcy Court for the Eastern District of Tennessee, granted Respondent's Motion for Assessment of Costs and Attorneys Fees and denied Petitioners' Motion for Recusal on March 26, 1986 (pp. 1A-10A). The District Court for the Eastern District of Tennessee affirmed the award of attorneys fees and denial of recusal on February 3, 1987 (pp. 1B-8B). On April 25, 1988, the Sixth Circuit Court of Appeals affirmed the District Court on both issues (pp. 1C-13C).

JURISDICTION

Jurisdiction in the instant case arose pursuant to 28 U.S.C. § 158(a).

Under the provisions of 28 U.S.C. § 2101(c), the time for filing this Petition expires Monday, July 25, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved is 28 U.S.C. § 455.

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy; or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the secruities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

Petitioners, on behalf of their client, Florida Investment and Leasing Company, hereinafter "Florida Investment" filed in the Bankruptcy Court for the Eastern District of Tennessee (Bankrupcty Court) a Motion for *ex parte* relief from the Automatic Stay and a Motion for Relief from the Automatic Stay. Said motions were filed in an attempt to obtain a fund held by the Trustees of David A. Crabtree and C.H. Butcher, Jr. The Bankruptcy Court held a hearing on February 22, 1984 and, after the hearing, denied the Motion for *ex parte* Relief from Stay. A written order was subsequently entered denying both the *ex parte* Motion and the Motion for Relief from Stay.

After learning that the *ex parte* Motion for Relief from Stay was denied, Mr. Fleming and Mr. Liberis appeared before the Bankruptcy Court for the Northern District of Florida, wherein the Chapter 11 case of Florida Investment was pending, and obtained an order lifting the automatic stay and temporarily restraining the Trustee and his attorneys from disbursing certain funds claimed to be owned by Florida Investment. On March 5, 1984, The United States Bankruptcy Court for the Eastern District of Tennessee

found Petitioners in contempt for violating the automatic stay. A contempt order issued by the Bankruptcy Court provided that the Petitioners were to pay costs and expenses, including attorneys fees, incurred as a result of the violation of the automatic stay.

Petitioners appealed the Contempt Order to the United States District Court for the Eastern District of Tennessee. The District Court upheld the Bankruptcy Court's finding of contempt and the Petitioners subsequently appealed the order of the District Court to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals affirmed the ruling of the District Court. After a petition for rehearing was denied, Respondents moved for an assessment of costs and attorneys' fees. Petitioners then filed a motion and an affidavit with the Bankruptcy Court requesting Judge Bare recuse himself due to a perceived personal prejudice against Petitioners. On March 26, 1986, the Bankruptcy Court awarded Respondents expenses and fees in the amount of $36,984.69 and denied Petitioners' motion for recusal. The bulk of this was incurred in defending the propriety of the contempt order on appeal in the District and Circuit Courts.

Respondents appealed the award of fees incurred on appeal of the contempt order and denial of recusal to the District Court for the Eastern District of Tennessee. On February 3, 1987, the District Court affirmed the order denying Petitioners' recusal motion and the order awarding attorneys' fees to Respondents. Petitioners subsequently appealed the District Court's ruling to the Sixth Circuit Court of Appeals. On April 25, 1988, the Sixth Circuit Court of Appeals affirmed the District Court on both issues.

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit Court of Appeals, holding that it was within the inherent power of the Bankruptcy Court to award attorneys' fees incurred for an appeal of the contempt order, directly conflicts with decisions of this Court and with well-established federal law.

The decision of the Sixth Circuit Court of Appeals affirming the denial of recusal conflicts with 28 U.S.C. Section 455 and its legislative history.

I

Petitioners first address the issue of the award of attorneys' fees on appeal. Attorneys' fees were awarded for expenses incurred at both the trial and appellate level. The issue of whether or not the trial court had within its power the right to award attorneys' fees incurred by the Trustee in obtaining the contempt order is not in issue. In *Roadway Express v. Piper, 447 US 752 (1980)* this court held that Federal courts have an inherent power to assess attorneys' fees against counsel who willfully abuse judicial process. Moreover, a court must make a specific finding as to whether counsel's conduct in the case constituted or was tantamount to bad faith. *Id at 767.*

There was no specific finding that Petitioners conduct rose to a level of bad faith in this case. A finding of bad faith is essential to any sanction under the court's inherent powers. A finding of bad faith is "a finding that would have to precede any sanction under the court's inherent powers. *Id.*

The issue of attorneys' fees was succinctly dealt with by this Court in *Alyeska Pipeline Service Company v. Wilderness Society,* 421 US 240, (1975), when this Court held "a prevailing litigant in not entitled to collect a reasonable attorneys' fee from the loser." *Id* at 247. Moreover, this Court held that:

> Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule, a Federal Court should not award attorneys' fees beyond the limit of 28 USC § 1923, those Courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in Federal litigation depending on the Courts' assessment of the importance of the public policies involved in particular cases. *Id.*

The award of attorneys' fees is limited to the situation where the award is allowed by statute, under the terms of an enforceable contract, or by one of the judicial exceptions specifically enumerated in the *Alyeska* decision. The Sixth Circuit has chosen, through its own judicial activism, to expand the holding of *Alyeska*. The Sixth Circuit attempts to justify the award of attorneys' fees on appeal by stating that Respondents' appellate loss stems directly from Petitioners' violation of initial order of the Bankruptcy Court. "Plaintiffs unsuccessful appeals of the civil contempt order force the Trustee to incur expenses in defending the Court's order. The Trustee's appellate expenses stem directly from Plaintiffs intentional disregard of the initial order of the Bankruptcy Court." *Charles S. Liberis, David L. Fleming, and Charles S. Liberis, P.A., v. D. Broward Craig,* slip op. at 14 (6th Cir. Apr. 25, 1988) (1C-13C).

It is true that Respondents' costs and expenses arose as a direct result of the Petitioners' allegedly contemptuous action and decision to appeal the holding of the Bankruptcy Court. This fact in no way justifies the award of attorneys' fees to a prevailing party on appeal. The logic used for this justification is sophistry in its purist form. One cannot think of a situation in which expenses incurred on appeal do not arise directly from the initial act which necessitated the original ruling of the lower court. Thus, the fact that the expenses incurred on appeal arose from the appeal of a contempt order in no way distinguishes those expenses from expenses which might arise under the appeal of any other court decision.

It is abundantly clear that the Sixth Circuit allowed the award of attorneys' fees in spite of the absence of an applicable statute, enforceable contract, or judicial exception recognized by this Court. Congress has provided appellate courts with a mechanism by which the courts may award attorneys' fees on appeal. Under the Federal Rules of Appellate Procedure, Rule 38, a prevailing party may be awarded fees incurred on appeal provided that there is a finding that the appeal was frivolous. This rule provides the appellate court with the means by which frivolous appeals may be

discouraged without chilling the appellate rights of litigants who could not appeal if faced with the possibility of incurring additional liability should their appeal be unsuccessful. The Sixth Circuit Court has not indicated that any appeal taken in this case was frivolous. The fact that Respondents prevailed on appeal does not indicate that the appeals were made in a frivolous manner or were in any other respect frivolous. To the contrary, there were serious questions of law and fact which were dealt with in a serious manner at the appellate level.

In determining the propriety of the order of attorneys' fees in this case, the Sixth Circuit relied heavily on *Schauffler v. United Association of Journeymen and Apprentices,* 246 F2d 867 (3rd Cir. 1957) and *Tamari v. Bache and Company,* (Lebanon), SAL 729 F2d 469 (7th Cir. 1984). *Schauffler* is easily distinguishable on several grounds. First, *Schauffler* was decided almost 18 years prior to the *Alyeska* decision. If *Schauffler* were decided post *Alyeska,* it would clearly be reversed. Neither *Alyeska* nor any subsequent decision of this court has held that attorneys' fees are awardable on appeal unless there is an enforceable contract, applicable statute, or other recognized judicial exception. Moreover, this court has never recognized that the appeal of a contempt order is in and of itself one of the exceptions which falls within the ambit of the *Alyeska* rationale. In support of the propriety of the award of attorneys' fees both in the trial court and on appeal, the Sixth Circuit, quoting from *Schauffler,* stated:

> 'because it was the order of the District Court which was violated, the court may assess costs of litigation in the contempt proceeding regardless of the court in which the expenses were incurred.' 246 F2d at 870 (citing *Toledo Scale Company v. Computing Scale Company,* 261 U.S. 399, 428 (1923) (charging contemnor with expenses incurred in defending suit brought by contemnor in violation of another courts' decree)).

Liberis v. Craig, slip op. at 13 (6th Cir. Apr. 25, 1988) (1C-13C).

To the extent that *Schauffler* relied upon *Toledo Scale,* as precedent for the awarding of attorneys' fees on appeal, it is simply wrong. The expenses incurred on appeal arising out of the defense of a contempt order have not been recognized as a judicial exception by this court. *Toledo Scale* does hold that a contemnor may be charged with the expenses incurred in defending a suit brought by contemnor in violation of another court's decree. Clearly, this is what happened in the instant case where the Trustee incurred expenses in bringing to the Bankrupcty Court's attention the fact that Petitioners violated the automatic stay by seeking relief in the Florida Bankruptcy Court. Under the *Toledo Scale* rationale, the Respondents would have been entitled to recover the expenses incurred in litigating in the Florida Bankruptcy Court. Moreover, under the *Roadway Express* rational, the respondents would also have been entitled to expenses incurred in seeking the contempt order if there had been a finding of bad faith. *Toledo Scale* does not stand for the proposition that attorneys' fees incurred on appeal of a contempt order may be awarded to the prevailing party. The issue of award of attorneys' fees incurred on appeal was not dealt with in *Toledo Scale,* and, therefore, *Toledo Scale* is not precedent for the award made by the bankrupcty court.

The Sixth Circuit Court of Appeals also relied heavily upon *Tamari v. Bache* as precedent for allowing the award of attorneys' fees incurred on appeal of a contempt order. In adopting the reasoning of the *Tamari* court, the Sixth Circuit quoted the following:

> 'We conclude that appellate expenses to Bache is consistent with the mandate of Rule 37(b). The Rule awards expenses 'caused by the failure' of a disobedient party to comply with a court order. Baches' appellate costs essentially were caused by the Tamaris' and the firms' failure to comply with the courts' original deposition deadline. When the firm chose to appeal the courts' imposition of the Rule 37(b) sanction, it caused Bache to incur additional expenses in order to defend

> the courts' sanction.' (citations omitted). The reasoning of the court in *Tamari* applies with equal force in the present case.... "Plaintiffs attempt to distinguish *Tamari* in other cases on the basis that they involve statutory exceptions to the American Rule, whereas, in the instant case, the Bankruptcy Court relied on its inherent judicial authority to impose attorneys' fees as a sanction for civil contempt. We find no principal basis for distinguishing between common law and statutory exceptions to the rule. Regardless of the source of the exceptions, fees and expenses incurred on appeal are allowable."

Liberis v. Craig, slip op. at 14, 15 (6th Cir. Apr. 25, 1988) (1C-13C).

The Sixth Circuit's holding disregards the holding of the *Alyeska* case. Under *Alyeska*, it is clear that if the statute awards attorneys' fees, that they may be awarded as an exception to the American Rule. *Alyeska* is also equally clear on the point that attorneys' fees may be awarded by one of the enumerated exceptions found in the opinion. *Alyeska* at 257-60. Although, *Roadway Express* subsequently recognized the inherent power of the trial court to award attorneys' fees arising in a proper case, none of the authority has extended such an award to the appeal of the contempt order itself. The Sixth Circuit is correct in its holding that there is no principled basis for distinguishing between common law and statutory exceptions to the American Rule. Attorneys' fees should be awarded in those cases which fall within the common law exceptions specifically recognized in *Alyeska.* Any award of attorneys' fees beyond those specifically allowed by the *Alyeska* decision should not be awarded. This court eloquently held, "[the] courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in Federal litigation depending on the Courts' assessment of the public policies involved in particular cases." *Alyeska* at 269.

II.

Petitioners also contended that Judge Bare should have recused himself pursuant to 28 U.S.C.§ 455(a). In affirming denial of the recusal motion, the Sixth Circuit concluded that 28 U.S.C. § 455 should be read in *pari materia* with 28 U.S.C. § 144. *Liberis v. Craig,* slip op. at 8 (6th Cir. Apr. 25, 1988) (1C-13C).

Title 28 U.S.C. § 144 provides in pertinent part:

> Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit to the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Title 28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself at any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The Sixth Circuit has added the additional caveat that "(j)udicial disqualifications under Sections 144 and 455 must be predicated upon extra judicial conduct rather than judicial conduct." *Liberis v. Craig,* slip op. at 9 (6th Cir. Apr. 25, 1988) (1C-13C). As authority for this proposition, the Sixth Circuit cited its own precedents of *Demjanjuk v. Petrovsky,* 776 F2d 571 (6th Cir. 1985), *cert denied* 475 U.S. 1016 (1986); *United States v. Storey,* 716 F2d 1088; *Cleveland v. Krupansky,* 619 F2d 576 (6th Cir.) *cert denied* 449 U.S. 834 (1980). Section 455 clearly states that a judge shall disqualify himself where "his impartiality might reasonably be questioned." The statute on its face and the underlying legislative history do not include the additional caveat regarding

extra judicial behavior. Moreover, even if Petitioners' affidavits were found to be insufficient in light of 28 U.S.C. § 144, the facts and circumstances of these proceedings are "such as would convince a reasonable man that a bias exists." *United States v. Storey,* at 1090.

Judge Bare himself recognized that his impartiality might reasonably be questioned in cases involving the Petitioners. In fact, he saw fit to recuse himself in a prior ruling involving the Petitioners. This recusal took place in a case styled *In re: Earl Wilson,* Case Number 3-83-00848; *William L. Davis v. Charles Liberis, P.A. and Charles Liberis* ad pro 3-84-0321 (Bankruptcy Eastern District Tennessee 1985).

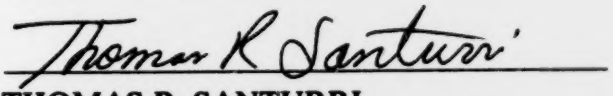
Due process demands that once a judge enters an order finding the act of contempt, that an impartial judge should define the punishment for contempt. *Mayberry v. Pennsylvania,* 400 U.S. 455, 456 (1974). Two exceptions exist to this rule. The exceptions are (1) when it is necessary to preserve order in the courtroom or (2) where a judge actually witnesses an act of contempt in open court, it would be a waste of judicial resources to have another court conduct the hearing to determine the facts. *U.S. v. Meyer,* 462 F2d 831 (3rd Cir. 1972). These exceptions cannot apply, inasmuch as several years elapsed between the time the contempt order was issued and the time that the attorneys' fees were awarded.

The Sixth Circuit has held that § 144 is to be read in *pari materia* with § 455. This might be a reasonable holding; however, the mere fact that an affidavit is deemed to be insufficient in no way relieves the judge of his responsibilities under § 455(a). Given the surrounding facts and circumstances, particularly the fact that Judge Bare deemed it necessary to recuse himself in another case involving the Petitioners, it is clear that the recusal and vacation of any order subsequent to the issuance of the contempt order would be proper as well.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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899

PROOF OF SERVICE

I, Thomas R. Santurri, Counsel of Record for the Petitioners herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 22nd day of July, 1988, I served three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on D. Broward Craig, Trustee-in-Bankruptcy for David A. Crabtree, Respondent herein by mailing the same in a duly addressed envelope with first class postage pre-paid, to Honorable Mark C. Follenberg and Honorable Eleanor Pelta, attorneys for Respondent, at their office address, 1333 New Hampshire Avenue, N.W., Suite 700, Washington, D.C. 20036.

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NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES S. LIBERIS, DAVID L. FLEMING,
AND CHARLES S. LIBERIS, P.A.,

Petitioners,

versus

D. BROWARD CRAIG, TRUSTEE IN BANKRUPTCY
FOR DAVID A. CRABTREE,

Respondent

APPENDICES

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APPENDIX A

FILED
MAR. 26, 1986

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

3-83-01116

In re
David A. Crabtree
a/k/a West Knoxville
Investment Company, Inc.
Debtor

ORDER NO. 208

In accordance with the Memorandum on Trustee's Motion for Taxation of Costs and Expenses filed this date, it is

ORDERED that D. Broward Craig, trustee, recover of Charles S. Liberis, P.A., Charles S. Liberis, and David L. Fleming the sum of $36,984.69.

ENTER: March 26, 1986.

BY THE COURT

CLIVE W. BARE
UNITED STATES BANKRUPTCY JUDGE

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

3-83-01116

In re
David A. Crabtree
a/k/a West Knoxville
Investment Company, Inc.
Debtor

MEMORANDUM ON TRUSTEE'S MOTION
FOR TAXATION OF COSTS AND EXPENSES

APPEARANCES: Cadwalader, Wickersham & Taft
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David L. Fleming

CLIVE W. BARE
UNITED STATES BANKRUPTCY JUDGE

D. Broward Craig, trustee of the debtor's estate asks the court to tax costs and expenses, including attorney fees, incurred in obtaining, and defending on appeal, an order of contempt against Charles S. Liberis, P.A., Charles S. Liberis, and David L. Fleming (respondents). Respondents contend they should not be taxed with the trustee's costs and expenses because the trustee did not sustain any actual damage as a consequence of their contempt, which was immediately purged. Alternatively, respondents insist that the court should limit the trustee to recovery of only reasonable expenses and fees incurred in this court--thus excluding the expenses generated by respondents' appeals to the district court and the circuit court of appeals--as of March 6, 1984, when respondents purged themselves of contempt.

I.

On August 16, 1985, the trustee filed a motion to tax costs and expenses, including attorney fees, in the amount of $39,850.49 against the respondents. The trustee's motion is filed pursuant to Order No. 61, entered in this case on March 5, 1984, which recites in part:

> The Court further ORDERS that all costs and expenses including attorneys' fees, as allowed by this Court, incurred by the Crabtree and C.H. Butcher, Jr. estates in response to the actions taken by Liberis[1] subsequent to this Court's order issued from the bench on February 22, 1984, denying Florida Investment's motion for relief from the automatic stay, be taxed against Charles S. Liberis, Charles S. Liberis, P.A. and David L. Fleming, but not against Florida Investment and Leasing Company....

On February 21, 1984, as counsel for Florida Investment & Leasing Co. (FILCO), a chapter 11 debtor in the Northern District of Florida, respondents and Sharon Lee, local counsel for

---

[1]In Order No. 61 "Liberis" is a collective reference for Charles S. Liberis, P.A., Charles S. Liberis, David L. Fleming, and Sharon Lee.

FILCO, filed a motion for ex parte relief from automatic stay and a separate motion for relief from automatic stay, seeking permission to proceed against the trustee in an adversary proceeding in the Bankruptcy Court for the Northern District of Florida. The object of the Florida adversary proceeding was to recover $1,700,000.00 in the custody of trustee Craig and the trustee for the estate of C.H. Butcher, Jr.;[2] FILCO also sought a restraining order prohibiting the two trustees from disbursing any portion of the $1,700,000.00. This court denied the motion for ex parte relief. Further, during a February 22, 1984, hearing on FILCO's motion for relief from stay, with Sharon Lee appearing on behalf of FILCO, the court stated that the proper procedure for challenging entitlement to the $1,700,000.00 would be for FILCO to file claims or adversary proceedings in this court.[3] Following the conclusion of the February 22, 1984, hearing, Sharon Lee notified Charles Liberis of the court's refusal to grant relief from the stay. Five hour later, respondents proceeded to, and did, obtain a restraining order, from the Bankruptcy Court for the Northern District of Florida, ordering trustee Craig and the trustee for the C.H. Butcher, Jr. estate to hold the $1,700,000.00 and refrain from disbursing any portion of said funds. When respondents refused to seek dissolution of the temporary restraining order, trustee Craig, joined by the trustee for the C.H. Butcher, Jr. estate, filed a motion for a show cause order seeking a finding of contempt. At the conclusion of a hearing on March 2, 1984, the court announced its finding that respondents had deliberately, illegally and unlawfully violated both this court's order and 11 U.S.C.A. § 362 (West 1979). On March 5, 1984, the court entered Order No. 61 memoralizing the findings at the March 2, 1984, hearing. Paragraph 12 of Order No. 61 recites:

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[2]An involuntary petition was filed in this court against C.H. Butcher, Jr. on June 24, 1983. See Case No. 3-83-01008.

[3]Order No. 57 denying FILCO's motions for relief from stay was entered February 23, 1984.

> The Court finds that there are no relevant facts in dispute. It finds that Florida Investment & Leasing Co., Inc. and its attorneys, Charles S. Liberis, Charles S. Liberis, P.A. and David L. Fleming have engaged in unlawful, illegal, deliberate and intentional violations of the order of this Court entered February 22, 1984 and of the automatic stay under § 362 of the Bankruptcy Code. It finds that they have been are in contempt of this Court.

Respondents appealed Order No. 61 to the district court, which affirmed this court's finding of civil contempt and dismissed the appeal. The district court's memorandum provides in part:

> Appellants clearly violated an order of the Tennessee bankruptcy court, which denied the motions for relief from the stay. Purposefully to avoid this order, appellants sought collateral relief from the Florida bankruptcy court. The proper course would have been for appellants to file in the Tennessee bankruptcy court a motion for reconsideration or to appeal the court's order.

Liberis v. Craig, Civ. No. 3-84-381, Memorandum at 4-5 (E.D. Tenn. Aug. 9, 1984).

Respondents appealed the district court's order to the circuit court of appeals, which affirmed the district court's ruling. The penultimate paragraph of the opinion of the Court of Appeals for the Sixth Circuit recites:

> Finally, appellants suggest that they legitimately and reasonably felt that the court in Florida could provide them with the same relief denied by the court in Tennessee because federal bankruptcy courts are individual courts and not part of a national system. We disagree. It is elementary that federal courts are part of a federal system and not individual entities free to ignore the rulings by other federal courts. Appellants, attorneys-

> at-law, know or should have known this as a matter of course. Given their positions as attorneys, *appellants can offer no justification for their actions.*

Liberis v. Craig, No. 84-5842, Opinion at 6 (6th Cir. June 7, 1985) (emphasis added).

II

An award of attorney's fees and expenses to a successful movant in a civil contempt proceeding may be appropriate. *TWM Mfg. Co. v. Dura Corp.,* 722 F.2d 1261, 1273 (6th Cir. 1983). But respondents urge the court to deny the trustee's motion for taxation of costs and expenses because the $1,700,000.00 fund was not jeopardized by their actions and the trustee did not sustain any actual damage. Additionally, respondents note they immediately purged themselves of the contempt found by this court and insist that "the contemptuous conduct in this case arose from their good faith belief and reasoned decision, based upon their experience as attorneys and a thorough review of the law, that their actions did not violate any order of this Court or the automatic stay of 11 U.S.C. § 362."[4] Respondents maintain "that the willfulness inherent in the contemptuous act is a major consideration in determining whether attorney's fees should be awarded to the opposing party." *In re Federal Facilities Realty Trust,* 227 F.2d 657, 658, (7th Cir. 1955).[5] Respondents contend their contemptuous acts were not willful and that any error on their part was rectified when the contempt was purged March 6, 1984, one day after entry of Order No. 61.

Respondents' argument wholly ignores this court's previous determination, recited in Order No. 61, that their contemptuous

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[4]Memorandum in Opposition to Trustee's Motion to Tax Costs and Expenses at 6, filed February 25, 1986.

[5]*Contra Perry v. O'Donnell,* 759 F.2d 702, 705 (9th Cir. 1985) (denial of fees in absence of willfulness denies full compensation to party proving contempt in many cases); *Cook v. Ochsner Found. Hosp.,* 559 F.2d 270, 272 (5th Cir. 1977) (willfulness of contempt irrelevant insofar as cost of prosecuting violation of court order and disallowance of those costs would reduce any benefit to successful movant).

acts were "deliberate and intentionaly violations" of this court's order and the automatic stay. Further, their argument also ignores the observation by the court of appeals that there is "no justification" for respondents' contemptuous acts.

Contending that in any event the trustee should not recover for expenses incurred after their contempt was purged, respondents ask the court to deny recovery by the trustee of all his expenses incurred as a result of the appeals *by respondents* to the district court and the circuit court of appeals. Respondents' position is untenable.[6] Order No. 61 unequivocally requires respondents to pay all costs and expenses, including attorney fees, as allowed by this court, incurred by the trustee in response to actions taken by them subsequent to this court's order from the bench on February 22, 1984, denying relief from the automatic stay. Hence, the award of costs and expenses in this matter pursuant to Order No. 61, affirmed by both the district court and circuit court of appeals, is a foregone conclusion.[7]

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[6]*Nelson v. Steiner,* 279 F.2d 944, 948 (7th Cir. 1960), disallowing two taxpayers' attorney fees and costs incurred on appeal by their unsuccessful opponents of a judgment in favor of the taxpayers, is not controlling. Persuasive authority exists for the allowance of the trustee's appellate costs. See *Westmoreland v. CBS, Inc.,* 770 F.2d 1168, 1179 (D.C. Cir, 1985) (appellate expenses allowed pursuant to F. R. Civ. P. 11 to a nonparty witness who successfully opposed a contempt action but had to appeal to obtain an award of attorney fees and expenses) and *Tamari v. Bache & Co.,* 729 F.2d 469, 475 (7th Cir. 1984) (requiring a party to bear appellate costs could substantially offset sanctions awarded pursuant to F. R. Civ. P. 37(b) and create a disincentive to seek sanctions, thus undermining the purpose for the rule). Respondents argue that *Westmoreland* and *Tamari* are distinguishable because the awards of attorney fees were based on express provisions of Federal Rules of Civil Procedure. Their argument overlooks the express provision of Order No. 61 authorizing recovery by the trustee for acts of respondents subsequent to February 22, 1984. Because the order of this court and a statute of Title 11 of the United States Code were violated, this court may assess the appellate expenses of the contempt litigation. *Schauffler v. United Ass'n of Journeymen & Apprentices of Plumbing,* 246 F.2d 867, 870 (3rd Cir. 1957).

[7]Respondents question the benefit to the estate of the actions taken by the trustee's attorneys subsequent to March 6, 1984, the date respondents purged themselves of contempt. Respondents' argument is frivolous. Clearly, the services rendered by the trustee's attorneys after March 6, 1984, benefit the estate by preserving the award in Order No. 61 of costs and expenses incurred in prosecuting the contempt proceeding.

Only the question of the reasonableness of the award sought by the trustee is at issue. The trustee seeks $37,727.08 for 284.51 compensable hours of services, rendered by ten attorneys and five legal assistants, plus $2,123.41 in expenses.[8] Respondents assert that the time records submitted by the trustee's attorneys reflect duplications of services; that on one occasion the trustee was represented by four attorneys at a hearing before this court; that Mr. Ellenberg, a partner in Cadwalader firm, spent nearly forty (40) hours working on a brief; that nearly twenty-eight (28) hours is billed for research by Mr. Mattos on the issue of whether respondents' actions violated the automatic stay; and that the trustee seeks $3,161.12 for 59.6 hours of services by paralegals in preparing the fee statement supporting his motion to tax costs and expenses.

The narrative of services reflects a two-hour office conference between Mr. Drabkin and Mr. Ellenberg on February 27, 1984, and a three-hour conference the following day among Messrs. Drabkin, Dichter, and Ellenberg. Further, more than forty hours were expended by these three attorneys in preparation for the March 2, 1984, show cause hearing before this court and the preliminary injunction hearing in Tallahassee. However, the court is not persuaded that their services were duplicative considering the gravity of the issues and the fact that their services were duplicated considering the gravity of the issues and the fact that appearances were necessary in two forums. Respondents mistakenly contend four attorneys appeared before this court on behalf of the trustee at the March 2, 1984, show cause hearing. Three attorneys (Messrs. Drabkin, Walker[9] and Wickham) did attend the hearing on behalf of the trustee.[10] This court previously

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[8]The reported actual time expended on this matter, 300.02 hours, includes approximately fifteen hours of travel time deleted in accordance with Order No. 129 and an accompanying memorandum entered October 31, 1984.

[9]Walker & Walker, P.C. is local counsel for the trustee.

[10]Mary Walker was apparently involved in the preparation for, but did not attend, the hearing.

disallowed interim compensation for the services of one of those three attorneys.[11]

Responsents' objections to the time billed for research by Mr. Mattos and appellate brief preparation by Mr. Ellenberg have no merit. The narrative of services reflects that Mr. Mattos' research involved more than the single issue of whether respondent's actions violated the automatic stay. Time charged for Mr. Ellenberg's services entails preparation of briefs for both the district court and the circuit court of appeals, as well as preparation for oral argument and a hearing before the Sixth Circuit Court of Appeals.

The $3,161.12 billed for preparation by paralegals of the fifteen-page fee statement supporting the trustee's motion does not appear to be justified by the record in this matter. The allowance for preparation of the fee statement shall not exceed three percent of the fees and expenses otherwise awarded.[12]

Additionally, the court does not believe the charges for the following services are supported by the record:

Date	Attorney	Service	Time
2/27/84	M. Walker	telephone conference about witness list	1.00
3/1/84	D. Wickham	filing show cause order	0.40
9/10/84	A. Emery	work on Liberis statement	1.00
9/14/84	A. Emery	Liberis contempt - work on statement of hours spent	1.00
11/20/84	M. Ellenberg	Review time charges	0.17
11/20/84	A. Emery	Review time entries	0.83

[11]See *In re Crabtree*, 45 B.R. 463, 468-69 n.20 (Bankr. E.D. Tenn. 1984) (3.0 hours of Douglas Wickham's services, billed at $100.00 per hour, on March 2, 1984, is duplicative).

[12]The court has previously allowed the Cadwalader firm interim compensation awards including allowances for fee preparation statements of approximately three percent of the total fees and expenses requested. See *In re. Crabtree*, 45 B.R. 463, 466 (Bankr. E.D. Tenn. 1984).

Accordingly, the award for attorney fees shall be reduced by the amount of $481.90.[13]

Deducting the amounts of $300.00, $3,161.12 and $481.90, the trustee is entitled to recover fees totaling $33,784.06 from the respondents. Expenses in the requested amount of $2,123.41 are fully allowed. Additionally, $1,077.22 is allowed for preparation of the fee statement. Hence, the total award equals $36,984.69.

FILED: March 26, 1986

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[13]Calculations by the court to determine the reduction are based on the fee rates reported on page 14 of the Schedule of Attorney Fees and Expenses, Exhibit D to the trustee's motion to tax co ts and expenses, filed August 16, 1985.

APPENDIX B

FILED
FEB. 3, 1987
IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:	§	
DAVID A. CRABTREE,	§	
a/k/a WEST KNOXVILLE	§	Case 3-83-0116
INVESTMENT CO., INC.,	§	
Debtor	§	
	§	
CHARLES S. LIBERIS,	§	
DAVID L. FLEMING and	§	
CHARLES S. LIBERIS, P.A.,	§	
Appellants	§	Case 3-86-332
vs.	§	
D. BROWARD CRAIG,	§	
Trustee in Bankruptcy for	§	
David A. Crabtree,	§	
Appellee	§	

MEMORANDUM

This is an appeal from an Order entered March 26, 1986 by the Bankruptcy Court for the United States District Court for the Eastern District of Tennessee awarding to D. Broward Craig, Trustee in Bankruptcy for David A. Crabtree, attorney's fees and expenses of $36,984.69 against the appellants. This Court has jurisdiction over this appeal by virtue of 28 U.S.C. §158(a).

This appeal arises out of an award of attorney's fees and expenses to D. Broward Craig, the Trustee in Bankruptcy for the David A. Crabtree Estate, against Charles S. Liberis, P.A., Charles S. Liberis and David L. Fleming regarding the appellants' civil

contempt and unsuccessful appeals of the contempt order. The action originally arose as a result of the appellants' efforts to obtain a $1.7 million fund from Craig and the Trustee of the C.H. Butcher, Jr. Bankruptcy Estate. Originally, the appellants filed a bankruptcy petition in Florida on behalf of a corporation and, in that case, commenced a proceeding to recover the $1.7 million from the two trustees. On February 22, 1984, appellants requested Judge Bare, the bankruptcy judge of this Court, to modify the automatic stay to permit the suit against the trustees to proceed in Florida. Judge Bare denied the motion to modify the stay. That same day, the appellants requested the Florida bankruptcy court to grant the same relief denied them by Judge Bare. That relief was granted and the appellants attempted to proceed against the trustees.

On March 5, 1984, Judge Bare issued an order holding the appellants in contempt of court for engaging in "unlawful, illegal, deliberate and intentional violations" of the Bankruptcy Court's order denying relief from the stay and of the automatic stay under 11 U.S.C. §362. The Bankruptcy Court's order also provided that the appellants would pay all costs and expenses, including attorney fees, incurred by the trustee of the Crabtree estate in response to the appellants' actions subsequent to the February 22, 1984 bench order denying relief from the automatic stay. Liberis appealed the order to this Court. On August 9, 1984, this Court affirmed that order. This Court's memorandum, found, in part, as follows:

> Appellants clearly violated an order of the Tennessee Bankruptcy Court, which denied the motions for relief from the stay. Purposefully to avoid this order, appellants sought collateral relief from the Florida Bankruptcy Court. The proper course would have been for appellants to file in the Tennessee Bankruptcy Court a motion for reconsideration or to appeal the Court's order.

Liberis V. Craig, Civ. 3-84-381, Memorandum at 4-5 (E.D. Tenn. August 9, 1984).

Appellants appealed the District Court's order to the United States Court of Appeals for the Sixth Circuit, which affirmed. The Sixth Circuit noted as follows:

> Finally, appellants suggest that they legitimately and reasonably felt that the court in Florida could provide them with the same relief denied by the court in Tennessee because federal bankruptcy courts are individual courts and not part of a national system. We disagree. It is elementary that federal courts are part of a federal system and not individual entities free to ignore the rulings by other federal courts. Appellants, attorneys at law, know or should have known this as a matter of course. Given their positions as attorneys [sic] appellants can offer no justicfication for their actions.

Liberis V. Craig, No. 84-5842, Opinion at 6 (6th Cir. June 7, 1985).

Subsequently, after the trustee moved for taxation of costs and attorneys fees, on September 5, 1985, appellants filed a motion and affidavit with the Bankruptcy Court requesting Judge Bare to recuse himself. The Bankruptcy Court denied this motion on November 1, 1985.

Thereafter, on March 26, 1986, the Bankruptcy Court awarded the trustee his expenses and fees in the amount of $36,984.69. This award included the fees incurred by the trustee in defending the contempt order on appeal in this Court and in the United States Court of Appeals for the Sixth Circuit.

The appellants raise the following two issues in this appeal:

> (1) Whether the bankruptcy judge's refusal to recuse himself from hearing the trustee's motion to tax costs and attorneys fees was error.
>
> (2) Whether the bankruptcy court committed error in awarding the trustee his attorney's fees and expenses

incurred in connection with the appeals from the contempt order.

Under a *de novo* review of the record, this Court affirms the order of the Bankruptcy Court.

I. *The Bankruptcy Judge's Decision Not to Recuse Himself.*

The appellants filed their motion requesting Judge Bare to recuse himself alleging that he had a personal bias or prejudice against them. As required by 28 U.S.C. §144, the appellants filed a supporting affidavit which was signed by Charles Liberis. The affidavit recited in part:

> As a result of that [March 2, 1984] contempt proceeding and possibly other events, Judge Bare has identified myself, David Fleming and my law firm with David Crabtree and C.H. Butcher, Jr. I believe in good faith that Judge Bare is prejudiced and biased against me and my law firm because of the perceived link between myself and Mr. Crabtree and Mr. Butcher. The result of these firmly held opinions by Judge Bare is that he cannot and will not judge the claims against [sic] David Fleming and me on the merits and according to the law but will decide them adversely regardless of the facts produced at trial and regardless of the law. The opinions that he has formed concerning myself and my law firm do not allow him to have impartiality of judgment.

Judge Bare, in a thorough opinion on the motion for recusal, noted that the order adjudging respondents' actions contemptuous represented a judicial, not a personal, reaction to a deliberate attempt to interfere with a sizeable sum of money within the jurisdiction of the Bankruptcy Court. Judge Bare also noted that he was not personally enbroiled with the respondents. He also concluded that he found no cause for personal bias or prejudice in the matter and declined to find grounds for recusal under 28 U.S.C. §§144 and 455(b)(1).

The relevant portions of Title 28 of the United States Code provide as follows.

> Section 144. *Bias or prejudice of judge.*
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists. ...
>
> Section 455. *Disqualification of Justice, Judge, or Magistrate.*
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. ...

The primary difference between §144 and §455 is that §455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint. *United States v. Story,* 716 F.2d 1088, 1091 (6th Cir. 1980). It is well settled that § 144 and § 455 "must be construed *'in pari materia'"* and disqualification must be predicated upon extrajudicial conduct rather than on judicial conduct. On a motion to disqualify a judge, though facts stated with particularity must be taken as true, affidavits which are conclusory or constitute merely opinions are not sufficient. *City of Cleveland v. Krupansky,* 619 F.2d 576, 578 (6th Cir.), *cert. denied,* 449 U.S. 834 (1980). the United States Court of Appeals for the Sixth Circuit has described the requirements of a sufficient affidavit:

> The facts and reasons set out in the affidavit "must give fair and adequate support to the charge of a bent of mind that may prevent or impeach impartiality of judgment"...The legal standard requires the facts to be such as would "convince a reasonable man that a bias exists"...A bias sufficient to justify recusal must be a personal bias "as distinguished from a judicial one", arising "out of the judge's background and association" and not his view of the law.

Story, 716 F.2d at 1090. A review of Judge Bare's opinion regarding the motion for recusal reveals that he considered the appellants' affidavit to be insufficient under the circumstances. This Court is in agreement with that conclusion. The affidavit is conclusory and contains merely opinion as to some possible bias. It points to no extrajudicial conduct which would suggest a bias on Judge Bare's part. Moreover, I find no facts alleged which would "convince a reasonable man that a bias exists." Accordingly, the Court finds that Judge Bare properly denied appellants' motion for recusal.

II. *The Appellee's Entitlement to Attorney Fees on Appeal.*

The Court initially notes that in the Bankruptcy Court's order adjudging the appellants guilty of contempt and in the appeals therefrom, the Bankruptcy Court, this Court and the Court of Appeals each concluded that the appellants could offer no justification for their actions in attempting to circumvent the order of the Bankruptcy Court. This finding is *res judicata* as to those questions and will not be reconsidered.

As the appellants point out, generally under the "American rule", each side bears its own attorney fees. However, an exception to this rule exists wherein attorney fees may be awarded to the prevailing party for the "willful disobedience of a court order...as part of the fine to be levied on the defendant." *Alyeska Pipeline Servia Company v. Wilderness Society*, 421 U.S. 240, 258 (1975). It is said that courts have inherent authority to enforce their judicial orders and decrees in cases of civil contempt by assessing

attorney fees. *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977).

The determination of assessible items of cost in civil contempt cases is within the discretion of the court whose dignity has been offended and it is no abuse of discretion to impose as a penalty the expenses incurred in defending the propriety of the original imposition of sanctions in the trial court. *See Crane v. Gas Screw Happy Pappy*, 367 F.2d 771 (7th Cir. 1966); *Schauffler v. United Association of Journeymen & Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, Local 420, AFL*, 246 F.2d 867, 870 (3rd Cir. 1957). This Court is of the opinion that is was entirely appropriate for Judge Bare to award the appellees their costs in defending the original contempt order on appeal. Requiring the innocent party to bear these costs could offset substantially the original award it obtained for bringing the contempt to the Court's attention. *Cf., e.g., Tamari v. Bache & Company*, 729 F.2d 469 (7th Cir. 1984) (appropriate to award prevailing party costs of defending trial court's action in imposing Rule 37 sanctions).

The appellants raise the case of *Federal Facilities Realty Trust v. Kulp*, 227 F.2d 657 (7th Cir. 1955). This case is distinguishable in that the contemptuous conduct grew out of confused circumstances under which the Bankruptcy Court misconstrued its own authority. This case is significantly different. The contempt in this case grew out of the appellants' actions for which there was no justification. *See Liberis v. Craig*, No. 84-5842 (6th Cir. October 27, 1984). Under the circumstances, it was entirely appropriate for the Bankruptcy Court to award the appellees their attorney fees incurred in defending the bankruptcy judge's original contempt order.

III. *Conclusion.*

For the foregoing reasons, the orders of the Bankruptcy Court in denying the appellants' motion for recusal and in awarding the appellees their attorney fees are AFFIRMED, and this appeal is DISMISSED.

Order accordingly.

James H. Jarvis
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
APR. 25, 1988
NO. 87-5321
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES S. LIBERIS,
DAVID L. FLEMING, and
CHARLES S. LIBERIS, P.A.,
Plaintiffs-Appellants,

vs.

D. BROWARD CRAIG,
Trustee-in-Bankruptcy for
David A. Crabtree,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Tennessee.

Before: JONES and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

GUY, Circuit Judge. Plaintiffs appeal the district court's order dismissing their appeal from an order of the bankruptcy court awarding the defendant attorneys' fees and expenses and denying their motion for recusal. This marks the second occasion in which this case has come before this court. In the previous proceeding, the bankruptcy court found the plaintiffs in civil contempt for intentionally disobeying a bankruptcy court order. Plaintiffs unsuccessfully appealed the contempt finding to the district court and to this court. On remand, defendant filed a motion for attorneys' fees and expenses incurred as a result of the contempt proceeding and the subsequent appeals. The plaintiffs filed a motion for recusal, alleging that the bankruptcy judge who had issued the contempt order was biased and, therefore, should recuse himself from hearing the motion for attorneys' fees. The

bankruptcy judge denied the motion for recusal and, in a subsequent order, granted the defendant's request for attorneys' fees and expenses. The plaintiffs appealed to the district court which affirmed the award of fees and the denial of plaintiffs' motion for recusal. For the following reasons, we affirm.

I.

This case is the most recent wave in a flood of federal litigation resulting from the collapse of the financial empire of C.H. Butcher, Jr. The instant controversy was sparked by a dispute over a $1.7 million fund located in a Florida bank. Ownership to the fund was claimed by the trustee for the bankrupt Butcher estate and by D. Broward Craig, the Trustee-in-Bankruptcy for the David A. Crabtree estate (Trustee). On December 30, 1983, the trustees filed a joint complaint in the United States Bankruptcy Court for the Eastern District of Tennessee, claiming that the fund constituted property of the Butcher and Crabtree bankruptcy estates. On Friday, February 10, 1984, the bankruptcy court entered a judgment ordering that the fund be divided equally between the two bankrupt estates. Immediately following the entry of the order, the funds were transferred by wire to the trustees' accounts in Tennessee.

The following Monday, February 13, 1984, the Florida Investment Leasing Company, Inc. (FILCO), filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Northern District of Florida. FILCO also filed a complaint claiming title to the $1.7 million fund and sought a temporary restraining order prohibiting the transfer of the fund. Essentially, FILCO claimed that Crabtree had fraudulently diverted the $1.7 million while serving as president of the company. The Butcher and Crabtree trustees were named as defendants in the FILCO complaint. The petition and complaint was filed on behalf of FILCO by the Florida law firm of Liberis & Fleming. On February 21, 1984, an *ex parte* petition for relief was filed in the United States Bankruptcy Court for the Eastern District of Tennessee requesting relief from the automatic stay to permit the suit against the trustees

to proceed in Florida. FILCO was represented by its Knoxville counsel, Sharon Lee. On February 22, 1984, Bankruptcy Judge Bare denied the motion and also denied the oral request of FILCO's counsel for a temporary restraining order prohibiting the trustees from disbursing the $1.7 million. Judge Bare ruled that the proper procedure for contesting title to the $1.7 million and for obtaining temporary injunctive relief would be to file an adversary proceeding against the trustees in the United States District Court for the Eastern District of Tennessee.

Immediately after the hearing concluded, Ms. Lee called FILCO's principal counsel, Charles Liberis, in Florida and informed him of the result. Later that same day, Charles Liberis and his partner, David Fleming (plaintiffs), appeared before the United States Bankruptcy Court for the Northern District of Florida seeking the same relief which had just been denied by Judge Bare in Tennessee. At approximately 10 p.m., the federal bankruptcy court in Florida entered an order lifting the automatic stay and issued a temporary restraining order against the trustees prohibiting them from disbursing the fund.

On February 29, 1984, upon the joint motion of the Butcher and Crabtree trustees, the federal bankruptcy court in Tennessee issued an order to show cause why Liberis and Fleming should not be held in contempt, and set a hearing for March 2, 1984, in Knoxville. On the same day, Liberis filed a motion with the federal bankruptcy court in Florida to enjoin the trustees from proceeding on the order to show cause on March 2, 1984. Following the hearing before the bankruptcy court in Tennessee, Judge Bare issued a written order finding Liberis and Fleming in contempt for engaging in "unlawful, illegal, deliberate, and intentional violations" of the February 22, 1984 order, denying relief from the stay, and of violating the automatic stay itself. *In re Crabtree*, No. 3-83-01116, Order and Memorandum No. 61, slip op. at 5 (Bankr. E.D. Tenn. March 5, 1984). The contempt order issued by Judge Bare also provided that Liberis and Fleming would pay all costs and expenses, including attorneys' fees

incurred by the trustees in response to the legal actions taken by Liberis after February 22, 1984. Slip op. at 6. The bankruptcy judge also order Liberis to dismiss the adversary proceeding against the trustees in Florida and to dissolve the injunction against the trustees. Liberis and Fleming appealed the bankruptcy court's order to the District Court for the Eastern District of Tennessee. The district court engaged in a *de novo* review of the record and found no material facts in dispute. Accordingly, the district court entered an order affirming the bankruptcy court's finding of civil contempt. In the memorandum which accompanied his order, District Judge Hull stated:

> Appellants clearly violated an order of the Tennessee bankruptcy court, which denied the motions for relief from the stay. Purposefully to avoid this order, appellants sought collateral relief from the Florida bankruptcy court. The proper course would have been for appellants to file in the Tennessee bankruptcy court a motion for reconsideration or to appeal the court's order. *See generally Maness v. Meyers*, 419 U.S. 449, 458-460 (1975); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191-193 (1949). A party may be held in civil contempt of court for violating a specific and definite order of the court of which the party has knowledge. *In re Lohnes*, 26 Bankr. 593, 596 (Bankr. D. Conn. 1983). Appellants had knowledge of the court's order denying their motions for relief from the stay and in violation of this order sought relief collaterally rather than following proper procedure. Thus, appellants properly were found in civil contempt.

Liberis v. Craig, Civ. 3-84-381, Memorandum, slip op. at 4-5 (E.D. Tenn. August 9, 1984).

Liberis appealed the August 9, 1984, order of the district court to this court. On June 7, 1985, this court issued an unpublished per curiam opinion in which we affirmed the ruling of the district court. In the penultimate paragraph of that opinion, we stated:

> Finally, appellants suggest that they legitimately and reasonably felt that the court in Florida could provide them with the same relief denied by the court in Tennessee becuase federal bankruptcy courts are individual courts and not part of a national system. We disagree. It is elementary that federal courts are part of a federal system and not individual entities free to ignore the rulings by other federal courts. Appellants, attorneys-at-law, know or should have known this as a matter of course. Given their positions as attorneys, appellants can offer no justification for their actions.

Liberis v. Craig, No. 84-5842, slip op. at 6 (6th Cir. June 7, 1985). Liberis subsequently made a motion for rehearing which was denied.

On August 16, 1985, trustee Craig filed a motion in the Bankruptcy Court for the Eastern District of Tennessee seeking the taxation of costs and expenses against Liberis and Fleming. On September 5, 1985, Liberis filed a motion and affidavit with the bankruptcy court requesting that Bankruptcy Judge Bare recuse himself from the case. In an affidavit attached to the motion, Liberis swore, "I believe in good faith that Judge Bare is prejudiced and biased against me and my law firm because of the perceived link between myself and Mr. Crabtree and Mr. Butcher." On November 1, 1985, Bankruptcy Judge Bare issued a memorandum and order in which the motion for recusal was denied. An evidentiary hearing on the request for attorneys' fees was held before Judge Bare on February 25, 1986. On March 26, 1986, Judge Bare issued an order awarding a total of $36,984.69 in legal fees and expenses to the trustee. The award included the fees incurred by the trustee in defending the contempt order on appeal before the district court and before this court. *In re Crabtree*, No. 3-83-0116 Memorandum (Bankr. E.D. Tenn. March 26, 1986).

Liberis appealed the bankruptcy court's orders denying recusal and awarding legal fees and expenses. On February 3, 1987,

District Judge Jarvis entered an order affirming both the order denying plaintiffs' recusal motion and the order awarding fees to the trustee. *Liberis v. Craig*, No. 3-86-332 (E.D. Tenn. Feb. 3, 1987). In a thorough and well-reasoned opinion, the district court first found that the bankruptcy judge did not err in refusing to recuse himself. Specifically, the court noted that the Liberis affidavit was conclusory in nature and did not state any facts to support the opinion of Liberis that Bankruptcy Judge Bare was biased against him. Therefore, the district court ruled that it was entirely appropriate for Judge Bare to award to the trustee the cost for bringing the initial contempt motion *and* defending the original contempt order on appeal. Therefore, the award of attorneys' fees was affirmed and the appeal was dismissed.

II.

Plaintiffs raise two arguments on appeal before this court. We address each issue *seriatim*.

A. Denial of the Recusal Motion

Plaintiffs contend that Bankruptcy Judge Bare should have recused himself from ruling on the trustee's motion for attorneys' fees since Judge Bare was the same judge who had initially found plaintiffs in contempt of court. Plaintiffs contend that an attorney who has been found to be in contempt is entitled to have the sanctions for contempt determined by a judge other than the one who cited him. Under the circumstances here, we find this argument without merit.

Title 28 U.S.C. § 144 provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therin, but another judge shall be assigned to hear such proceeding.

Title 28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personel knowledge of disputed evidentiary facts concerning the proceeding....

It is well settled that sections 144 and 455 must be read *in pari materia*. *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983); *Cleveland v. Krupansky*, 619 F. 2d 576, 578 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980). The standard for recusal requires the facts asserted to be "such as would convince a reasonable man that a bias exists." *United States v. Story*, 716 F.2d at 1090.

Recusal is not mandatory upon the filing of an affidavit stating a good faith belief regarding the judge's bias. Rather, the affidavit must be "sufficient." 28 U.S.C. § 144. In *Cleveland v. Krupansky*, the Sixth Circuit held that affidavits that are "'assertions merely of a conclusionary nature are not enough nor are opinions or rumors'". 619 F.2d at 578 (quoting *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied sub nom. Ehrlichman v. United States*, 431 U.S. 933 (1977)). Similarly, in *United States v. Story*, the court stated: "The facts and reasons set out in the affidavit 'must give fair and adequate support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'" 716 F.2d at 1090 (citations omitted).

Moreover, judicial disqualification under sections 144 and 455 must be predicated upon extrajudicial conduct rather than upon judicial conduct. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *United States v. Story*, 619 F.2d at 1091; *Cleveland v. Krupansky*, 619 F.2d at 578. The judge's impression of perceptions based upon information gained during the trial cannot be the basis of an allegation of bias. *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d (6th Cir. 1984); *United States v.*

Porter, 701 F.2d 1158 (6th Cir.), *cert. denied*, 464 U.S. 1007 (1983).

Plaintiffs have asserted no facts which would lead a reasonable person to doubt the impartiality of Judge Bare. The Liberis affidavit was speculative, and Liberis did not allege one extra-judicial incident which would give the appearance of bias or warrant recusal. Moreover, a judge need not disqualify himself from imposing sanctions for contempt unless he has become so "personally embroiled" with counsel so as to be unfit to sit in judgment. *Farmer v. Strickland,* 652 F.2d 427, 438 (5th Cir. 1981), *cert. denied,* 455 U.S. 944 (1982) (quoting *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971)). In *Farmer,* the Fifth Circuit upheld the sentence for counsel's criminal contempt, although it was made by the judge who had held him in contempt for insulting, sarcastic, and disrespectful behavior to the court. The court noted the Supreme Court's recognition of the principle that, even in criminal cases, "not every attack on a judge . . . disqualifies him from sitting." Rather, the attack must be personal and inflamatory. 652 F.2d at 438 (citing *Mayberry,* 400 U.S. 455 (1971)). In the instant case, plaintiffs' contumacious actions were not insulting nor were they personally directed at Judge Bare. The contempt certainly did not sink "to the level of personal vilification and scurrilous attacks on the judge so as to disqualify him from pronouncing sentence on the contemnor." *Farmer,* 652 F.2d at 439. Thus, we find that plaintiffs have failed to allege any facts which would indicate that Judge Bare was biased or incapable of reaching an impartial decision. Moreover, we note that the district court conducted a *de novo* review of the contempt order and the imposition of sanctions. Plaintiffs do not allege that either District Judge Hull or District Judge Jarvis were biased against them. Accordingly, we uphold the district court's order affirming the order of the bankruptcy court denying the plaintiffs' motion for recusal.

B. The Award of Costs and Attorneys' Fees

This court has already upheld the initial order of the bankruptcy court finding plaintiffs in civil contempt for wilfully dis-

obeying the order of the bankruptcy court and the provisions of the automatic stay. We found that the plaintiffs could offer no justification for their actions in attempting to circumvent the order of the bankruptcy court. This find is *res judicata* as to those questions and will not be reconsidered. Therefore, the only question before us is whether the bankruptcy court abused its discretion in determining the amount of legal fees and expenses awarded to the trustee. Apparently, plaintiffs concede that the trustee was entitled to recover costs associated with bringing the initial contempt motion against the plaintiffs before the bankruptcy court. Plaintiffs, however, contend that the trustee should not be allowed to recover any of the costs incurred as a result of defending plaintiffs' subsequent appeals of the contempt order before the district court and before this court. We disagree.

Under the "American Rule," attorneys' fees are generally not recoverable by the prevailing litigant in a federal civil action absent a specific statutory grant of authority for the award of fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). A well recognized exception to this rule, however, exists by virtue of the inherent power of a court to enforce its own orders. Courts have inherent authority to enforce their judicial orders and decrees in cases of civil contempt by assessing attorneys' fees. *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977). Thus, attorneys' fees may be awarded to the prevailing party for the "wilfull disobedience of a court order...as a part of the fine to be levied on the defendant." *Alyeska*, 421 U.S. at 258.

The determination of assessable items of cost in civil contempt cases is within the discretion of the court whose dignity has been offended and it is no abuse of discretion to impose as a penalty the expenses incurred in defending the propriety of the original imposition of sanctions in the trial court. *See Cook*, 559 F.2d at 272; *Crane v. Gas Screw Happy Pappy*, 367 F.2d 771 (7th Cir. 1966), *cert. denied sub nom. Borrowdale v. Reuland*, 386 U.S. 959 (1967); *Schauffler v. United Association of Journeymen & Apprentices*, 246 F.2d 867, 870 (3rd Cir. 1957).

In *Schauffler,* a local union and two union officers were held in contempt for violation of an injunction against work stoppages. The United States Court of Appeals for the Third Circuit held that the district court could award the Regional Director of the National Labor Relations Board litigation expenses for the prosecution of the contempt cases both in the district court and on appeal. The *Schauffler* court stated:

> Because it was the order of the district court which was violated, the court may assess costs of litigation in the contempt proceedings regardless of the court in which the expenses were incurred.

246 F.2d at 870 (citing *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 428 (1923) (charging contemnor with expenses incurred in defending suit brought by contemnor in violation of another court's decree)).

In *Crane v. Gas Screw Happy Pappy,* the appellant was held in civil contempt for refusing to comply with the district court's order that certain property be returned to the appellee. The United States Court of Appeals for the Seventh Circuit affirmed the district court's finding of contempt and assessed against appellant the costs of the appeal:

> The flagrant and contumacious character of the appellant's defiance of the court's orders makes it appropriate that appellee be reimbursed for items of expenses necessarily incurred on appeal for the court in defending the adjudication of the District Court.

367 F.2d at 775 (citations omitted).

In awarding the trustee attorneys' fees and expenses incurred on appeal, the bankruptcy court relied in part upon *Tamari v. Bache & Co. (Lebanon), S.A.L.,* 729 F.2d 469 (7th Cir. 1984), a case involving a statutory exception to the American Rule. In *Tamari,* the Court of Appeals for the Seventh Circuit awarded appellate expenses as part of sanctions under Fed. R. Civ. P. 37(b), for the failure to appear for court ordered discovery depostions. The

Tamari court stated:

> We conclude that appellate expenses to Bache is consistent with the mandate of Rule 37(b). The rule awards expenses "caused by the failure" of the disobedient party to comply with a court order. Bache's appellate costs essentially were caused by the Tamari's and the Firm's failure to comply with the court's original deposition deadline. When the Firm chose to appeal the court's imposition of the Rule 37(b) sanction, it caused Bache to incur additional expenses in order to defend the court's sanction.

729 F.2d at 475 (citation omitted).

The reasoning of the court in *Tamari* applies with equal force in the present case. Plaintiffs' defiance of the order of the bankruptcy court caused the trustee of the Crabtree estate to incur expenses in bringing the violation to the attention of the court. Plaintiffs' unsuccessful appeals of the civil contempt order forced the trustee to incur expenses in defending the court's order. The trustee's appellate expenses stemmed directly from plaintiffs' intentional disregard of the initial order of the bankruptcy court.

Plaintiffs attempt to distinguish *Tamari* and other cases on the basis that they involve statutory exceptions to the American Rule, whereas, in the instant case, the bankruptcy court relied on its inherent judicial authority to impose attorneys' fees as a sanction for civil contempt. We find no principled basis for distinguishing between common law and statutory exceptions to the American Rule. Regardless of the source of the exception, fees and expenses incurred on appeal are allowable. Therefore, in the instant case, we find no abuse of authority on the part of the bankruptcy judge in awarding legal fees and expenses incurred in defending against plaintiffs' unsuccessful appeals of the contempt order to the district court and to this court.

Plaintiffs claim that they purged themselves of contempt shortly after the bankruptcy court's contempt order was issued on January 25, 1984, by dismissing their action which had been pending before the Florida bankruptcy court. Plaintiffs contend

that they cannot be held liable for any costs which were incurred by the trustee subsequent to the cessation of their contumacious conduct. In support of their argument, plaintiffs cite to the decision of the Court of Appeals for the Fifth Circuit in *Cook v. Ochsner Foundation Hospital,* 559 F.2d 270, 272, (5th Cir. 1977):

> The theory for allowing attorneys' fees for civil contempt is that civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance.

Plaintiffs argue that the award of costs incurred on appeal of the contempt order could no be justified as a "sanction to enforce compliance" since plaintiffs had already complied with the order by discontinuing their suit in Florida. Moreover, plaintiffs claim that the trustee was not directly injured by their contumacious conduct. Thus, plaintiffs conclude that the American Rule applies to the fees incurred in connection with defending the contempt finding on appeal. We disagree.

The paragraph in *Cook v. Ochsner,* from which the foregoing quotation was taken, also contains the following language:

> Courts have, and must have, the inherent authority to enforce their judicial orders and decrees in cases of civil contempt. Discretion, including the discretion to award attorneys' fees, must be left to a court in the enforcement of its decrees.

559 F.2d at 272. In the instant case, there is no question that the bankruptcy court had the authority to award attorneys' fees against the plaintiffs to compensate the trustee for bringing plaintiffs' contempt to the court's attention. Subsequent to the finding of civil contempt by the bankruptcy court, the trustee was forced to defend plaintiffs' challenges to the contempt order before the district court and then on appeal before this court. As previously noted, the costs associated with these appeals were a direct result

of the plaintiffs' initial contumacious conduct. The trustee was forced to incur these costs to defend the contempt order on appeal, regardless of whether or not the actual contumacious conduct which had given rise to the contempt order had ceased. Therefore, we find that the bankruptcy judge did not abuse his discretion by awarding attorneys' fees and expenses incurred by the trustees as a result of the plaintiffs' unsuccessful appeals of the orders holding them in contempt.

For the foregoing reasons, the judgment of the district court below is AFFIRMED.

(2)

No. 88-138

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES S. LIBERIS, DAVID L. FLEMING
and CHARLES S. LIBERIS, P.A.,
Petitioners,

v.

D. BROWARD CRAIG, TRUSTEE IN BANKRUPTCY
for DAVID A. CRABTREE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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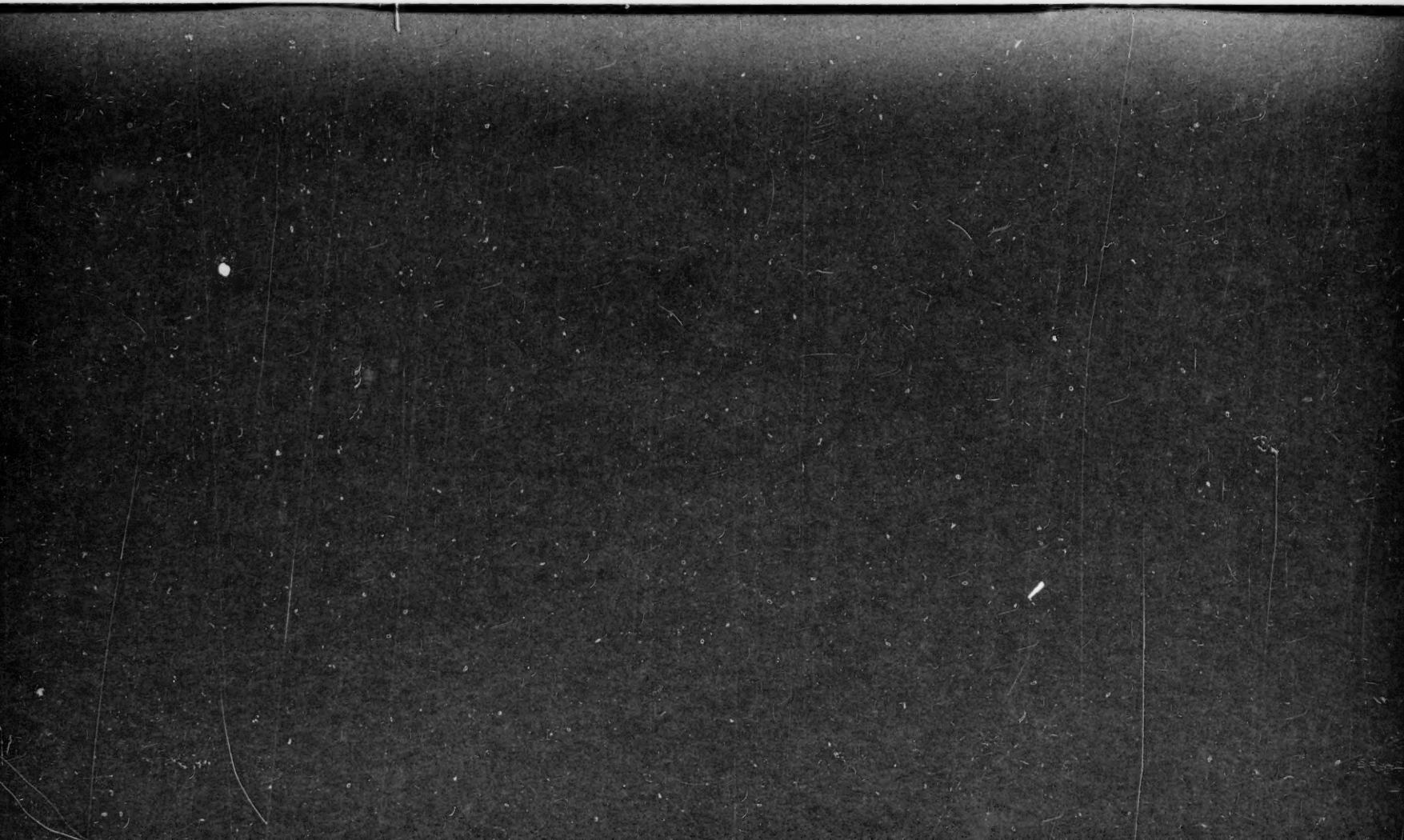

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the Bankruptcy Court and District Court did not abuse their discretion in awarding to a bankruptcy trustee attorneys' fees and expenses incurred in responding to petitioners' unsuccessful appeal of civil contempt sanctions.

2. Whether the Court of Appeals correctly held that the Bankruptcy Court judge was not required to recuse himself from ruling on the request for attorneys' fees simply because he made the initial contempt finding and where there was no showing of bias or prejudice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-138

CHARLES S. LIBERIS, DAVID L. FLEMING
and CHARLES S. LIBERIS, P.A.,
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v.

D. BROWARD CRAIG, TRUSTEE IN BANKRUPTCY
for DAVID A. CRABTREE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent D. Broward Craig, Trustee of the bankruptcy estate of David A. Crabtree, respectfully submits this brief in opposition to the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Liberis v. Craig*, No. 87-5321 slip op. (6th Cir. April 25, 1988). The opinions of the lower courts are attached as appendices A, B, and C to the petition for writ of certiorari.

STATEMENT OF THE CASE

The petition for a writ of certiorari filed by Charles S. Liberis, David L. Fleming and Charles S. Liberis, P.A. (the "Petitioners") stems from Petitioners' intentional disobedience of an order of the United States Bankruptcy Court for the Eastern District of Tennessee, for which they were judged in civil contempt. Petitioners seek review of the judgment of the United States Court of Appeals for the Sixth Circuit, filed on April 25, 1988, affirming the award of attorneys' fees and expenses to Respondent D. Broward Craig, Trustee of the bankruptcy estate of David A. Crabtree ("Craig"). The fees and expenses were incurred in obtaining the contempt order and defending it on appeal. Petitioners also seek review of the Court of Appeals' judgment upholding the decision by Bankruptcy Judge Bare not to recuse himself from ruling on the award of the fees.

Petitioners are attorneys in Florida who, in 1984, represented a company called Florida Investment and Leasing Company, Inc. ("FILCO"). The contempt proceedings arose from Petitioners' attempt to obtain a $1.7 million fund from Craig and the trustee of the C.H. Butcher, Jr. bankruptcy estate (collectively the "Trustees"). The fund in question was transferred to the Trustees pursuant to a judgment entered by the Bankruptcy Court on February 10, 1984. On February 13, 1984, Petitioners filed a bankruptcy petition in the United States Bankruptcy Court for the Northern District of Florida (the "Florida Bankruptcy Court") on behalf of FILCO. Petitioners also filed on FILCO's behalf a complaint against the Trustees in the Florida Bankruptcy Court, claiming title to the fund.

On February 22, 1984, Petitioners filed a motion in the Tennessee Bankruptcy Court requesting *ex parte* relief from the automatic stay to permit the suit against the Trustees to proceed in Florida. That same day, Judge Bare of the Bankruptcy Court denied the motion at a

hearing attended by FLICO's Tennessee counsel. Hours after learning that the Tennessee Bankruptcy Court had denied the request for relief from the stay, Petitioners appeared before the Florida Bankruptcy Court seeking the same relief. Petitioners made this motion without any notice to the Trustees. The Florida Bankruptcy Court granted the requested relief and issued a temporary restraining order prohibiting the Trustees and their attorneys from disbursing the $1.7 million.

On March 5, 1984, upon the joint motion of the Trustees, Judge Bare found Petitioners in contempt for engaging in "unlawful, illegal, deliberate and intentional violations" of the February 22 order denying relief from the stay and of the automatic stay itself.[1] The contempt order issued by the Bankruptcy Court also provided that Petitioners would pay all costs and expenses, including attorneys' fees, incurred by the Trustees in response to Petitioners' actions taken after February 22, 1984.[2]

Petitioners appealed the contempt order to the United States District Court for the Eastern District of Tennessee. The District Court conducted a *de novo* review of the record and found no material facts to be in dispute. The District Court held:

> Appellants [i.e. Petitioners] clearly violated an order of the Tennessee Bankruptcy Court, which denied the motions for relief from the stay. Purposefully to avoid this order, Appellants sought collateral relief from the Florida Bankruptcy Court. The proper course would have been for Appellants to file in the Tennessee Bankruptcy Court a motion for reconsideration or to appeal the Court's order.[3]

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[1] *In re Crabtree*, No. 3-83-01116, Order Memorandum No. 61 at 5 (Bankr. E.D. Tenn. Mar. 5, 1984).

[2] *Id.* at 6.

[3] *Liberis v. Craig*, Civ. 3-84-381, Memorandum at 4-5 (E.D. Tenn. August 9, 1984).

Petitioners then appealed the order of the District Court to the Sixth Circuit Court of Appeals. On June 7, 1985, the Court of Appeals, in a per curiam opinion, affirmed the ruling of the District Court, stating:

> Appellants suggest that they legitimately and reasonably felt that the court in Florida could provide them with the same relief denied by the court in Tennessee because federal bankruptcy courts are individual courts and not part of a national system. We disagree. It is elementary that federal courts are part of a federal system and not individual entities free to ignore the rulings by other federal courts. Appellants, attorneys at law, know or should have known this as a matter of course. Given their positions as attorneys, Appellants can offer no justification for their actions.[4]

Petitioners' subsequent motion for a rehearing was denied.

On August 16, 1985, Craig moved in the Tennessee Bankruptcy Court for assessment of costs and attorneys' fees against Petitioners. On September 5, 1985, Petitioners filed a motion and affidavit with the Bankruptcy Court requesting Judge Bare to recuse himself. Petitioners alleged that Judge Bare had a personal bias against them. The Bankruptcy Court denied the motion on November 1, 1985. Subsequently, on March 26, 1986, after an evidentiary hearing, the Bankruptcy Court awarded Craig expenses and fees of $36,984.69. This award included the fees incurred by Craig in defending the contempt order on appeal in the District Court and in the Sixth Circuit.[5]

Petitioners then appealed to the District Court the orders denying recusal and awarding fees. On February

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[4] *Liberis v. Craig*, No. 84-5842, slip op. at 6 (6th Cir. June 7, 1985).

[5] Memorandum Opinion of the Bankruptcy Court (Mar. 26, 1986), reprinted in the Petition for Writ of Certiorari, Appendix A.

3, 1987, the District Court, again upon a *de novo* review of the record, affirmed both of the orders of the Bankruptcy Court.[6]

Petitioners then appealed the District Court's February 3, 1987 order to the Sixth Circuit, which affirmed.[7] The Court of Appeals, applying the "abuse of discretion" standard, held that the Bankruptcy Court was entitled to award attorneys' fees not only for the initial contempt motion, but also for defending Petitioners' subsequent appeals of the contempt order. The court stated that under a "well recognized exception" to the American Rule, courts have "inherent authority to enforce their judicial orders and decrees in cases of civil contempt by assessing attorneys' fees."[8] Citing numerous cases, the court went on to hold that attorneys' fees incurred on appeal may be appropriately awarded, since Craig's "appellate expenses stemmed directly from plaintiff's intentional disregard of the initial order of the bankruptcy court."[9]

The Court of Appeals also ruled that Judge Bare was not required to recuse himself. The court found that Petitioners' affidavit in support of their recusal motion was "speculative"; and that Petitioners' actions were not "insulting" or personally directed at Judge Bare. The court also observed that the district court had conducted a *de novo* review of both the contempt order and the award of attorneys' fees, without provoking additional charges of bias from Petitioners.[10]

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[6] *Liberis v. Craig*, No. 3-86-332 (E.D. Tenn. Feb. 3, 1987). *See* Petition, Appendix B.

[7] *Liberis v. Craig*, No. 87-5321 slip op. (6th Cir. April 25, 1988). *See* Petition, Appendix C.

[8] *Id.* p. 9c.

[9] *Id.* p. 11c.

[10] *Id.* p. 8c.

Petitioners then filed the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion of April 25, 1988.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

This Court will grant review on writ of certiorari, in its discretion, "only when there are special and important reasons" for review. S.Ct. R. 17.1. The Petitioners claim that review should be granted on the attorneys' fees issue because the Sixth Circuit's decision conflicts with decisions of this Court and with "federal law." They further claim that the Sixth Circuit's decision on the recusal issue should be reviewed because it conflicts with 28 U.S.C. § 455.[11]

Neither of the Petitioners' claims has merit. The decision of the Court of Appeals fully comports with the decisions of this Court and the applicable statutes. Moreover, it is supported by the decisions in every other federal court of appeals to have addressed the issues. Because the Petitioners have failed to establish a reasoned basis for this Court to review this case, their petition for certiorari should be denied.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE AWARD BY THE BANKRUPTCY AND DISTRICT COURTS OF FEES AND EXPENSES INCURRED ON PETITIONERS' UNSUCCESSFUL APPEALS WAS A PROPER EXERCISE OF DISCRETION

Petitioners have mounted a very narrow attack on the Sixth Circuit's affirmance of the award of attorneys' fees.

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[11] Petition, p. 5. Under Supreme Court Rule 17.1(a), review may also be granted to resolve a conflict among the circuits. Petitioners understandably do not attempt to rely on this consideration. The circuits are in full agreement with the result reached by the Sixth Circuit below.

They concede, as they must, that the trial court had the inherent judicial power to award attorneys' fees incurred by Craig in obtaining the contempt order.[12] This power constitutes a long recognized exception to the "American Rule" that attorneys' fees are not recoverable by the prevailing litigant in a federal civil action in the absence of statutory authority. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975). There is also no dispute that the determination as to the amount of fees to award against Petitioners for their intentional violation of the Bankruptcy Court's order was wholly in the discretion of the Bankruptcy Court and the District Court. *See United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980); *Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977). The decision to award fees and the amount of fees to be awarded are reviewed only for an abuse of discretion. *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985).

Petitioners' sole claim is that the Bankruptcy Court and District Court abused their discretion in awarding Craig his attorneys' fees and expenses in defending against Petitioners' unsuccessful appeals of the contempt order. Petitioners' claim is unsupported by any authority whatsoever and, as discussed in the Court of Appeals' opinion, there is extensive authority to the contrary.

Petitioners' contention that the decision below conflicts with this Court's holding in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), is manifestly incorrect. Even were Petitioners correct that *Roadway* requires a finding of bad faith, Judge Bare's contempt order met the standard. He found that Petitioners had engaged in "unlawful, illegal, deliberate and intentional violations" of his February 22, 1984 order. In fact, however, Petitioners have misstated the holding of *Roadway*. *Roadway* involved the "bad faith" exception to the American Rule,

[12] Petition, p. 6.

which the Court recognized as totally separate from the exception ivolved here—the "willful disobedience of a court order." *Id.* at 766.[13] The Court in *Roadway* made it abundantly clear that a specific finding of bad faith is only required in cases involving the "bad faith" exception. *Id.* at 767.

Petitioners' next assertion, that the Court of Appeals' affirmance of the award of attorneys' fees incurred on appeal is somehow in conflict with *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), is equally without merit. Far from being in conflict, the opinion below relied on *Alyeska* and is fully consistent with that decision.

The Court in *Alyeska* explicitly recognized the "inherent power in the courts" to assess attorneys' fees for the "willful disobedience of a court order . . . as part of the fine to be levied on the defendant . . . ." 421 U.S. at 258. Nothing in *Alyeska* even suggests, much less states, that this power is restricted to the granting of attorneys' fees incurred only in the court that issued the order.

Indeed, at the time *Alyeska* was decided, the inherent judicial authority of the courts to award fees and expenses incurred on appeal of a contempt order was well established. *See, e.g., Schauffler v. United Ass'n of Journeymen & Apprentices*, 246 F.2d 867, 870 (3d Cir. 1957); *Crane v. Gas Screw Happy Pappy*, 367 F.2d 771, 775 (7th Cir. 1966), *cert. denied sub nom. Borrowdale v. Reuland*, 386 U.S. 959 (1967). In the very case cited in *Alyeska* for the proposition that a court may assess attorneys' fees for the willful disobedience of a court order,[14] this Court upheld the award of attorneys' fees

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[13] The Court quoted from the Court's opinion in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975), in which the Court discussed each exception separately.

[14] *Alyeska*, 421 U.S. at 258.

incurred in a court other than the court issuing the order that was violated. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-428 (1923). Finally, the restriction that Petitioners profess to divine in *Alyeska* would be inconsistent with the concededly broad discretion of trial courts to determine the propriety and amount of attorneys' fees. In short, *Alyeska* is in conflict with Petitioners' position—not with the result reached by the Court of Appeals, the District Court, and the Bankruptcy Court.[15]

Petitioners concede that Craig's attorneys' fees and expenses "arose as a direct result" of their contumacious actions and subsequent appeals. Nevertheless, they contend that expenses incurred on appeal of a contempt order are indistinguishable "from expenses which might arise under the appeal of any other court decision." Petition, p. 7. The spuriousness of this argument is demonstrated by the numerous cases cited in the Court of Appeals opinion which hold that a court may award attorneys' fees incurred on appeal. The key to all of these decisions is the discretionary authority of the court to award the costs *necessarily* resulting from the violation of the trial court's order. The identity of the court in which these costs are incurred is irrelevant.

In *Schauffler v. United Ass'n of Journeymen & Apprentices*, 246 F.2d 867 (3d Cir. 1957), a local union and two union officers were held in contempt for violation of an injunction against work stoppages. The United States

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[15] Petitioners argue that because Rule 38 of the Federal Rules of Appellate Procedure provides for fee awards in the case of frivolous appeals, and because there was no finding by the Court of Appeals that Petitioners, appeal was frivolous, Craig is not entitled to attorneys' fees incurred on appeal. Petition, pp. 7-8. Petitioners' argument is an obvious *non sequitur*. The fact that the Court of Appeals may award attorneys' fees under Fed. R. App. P. 38 does not mean that the trial court is precluded from awarding such fees under its inherent authority.

Court of Appeals for the Third Circuit held that the district court could allow litigation expenses for the prosecution of the contempt cases both in the district court and on appeal. The court stated:

> The determination of assessable items of cost in civil contempt is within the discretion of the court whose dignity has been offended, and it is not an abuse of that discretion to impose as a penalty the expenses incurred in defending the propriety of the original imposition in an appeal court.
>
> . . . Because it was the order of the district court which was violated, that court may assess costs of litigation in the contempt proceedings regardless of the court in which the expenses were incurred.

Id. at 870, citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923).

Petitioners attempt to distinguish *Schauffler* by asserting that it improperly relied on *Toledo Scale.*[16] Petition, p. 9. Petitioners miss the point. *Toledo Scale* approved the award by one court of attorneys' fees incurred defending a collateral attack of the court's judgment in another court. The *Schauffler* court cited *Toledo Scale* for the proposition that courts have wide discretion to award attorneys' fees as a sanction for contempt—*includ-*

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[16] Petitioners also argue, without citing any authority, that *Schauffler* would have reached a different result had it been decided after *Alyeska.* Petition at 8. Petitioners' contention is illogical and unfounded. The fact that the Supreme Court did not specifically address the recoverability of attorneys' fees on appeal hardly leads to the conclusion that such fees would not be allowed. On the contrary, *Alyeska* recognizes statutory and judicial exceptions to the American Rule, one of which is that attorneys' fees may be recovered on appeal. Numerous cases decided after *Alyeska* have reached the same result as *Schauffler. See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469 (7th Cir. 1984); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977); *Marks v. Prattco, Inc.*, 633 F.2d 1122 (5th Cir. 1981).

ing attorneys' fees incurred in another judicial forum.[17] The fact that *Toledo Scale* concerned fees incurred in another district court, while *Schauffler* happened to concern fees incurred on appeal, is irrelevant to the analysis.

Similarly, in *Crane v. Gas Screw Happy Pappy*, 367 F.2d 771 (7th Cir. 1966), *cert. denied sub nom. Borrowdale v. Reuland*, 386 U.S. 959 (1967), the appellant was held in civil contempt for refusing to comply with the district court's order that certain property be returned to the appellee. The United States Court of Appeals for the Seventh Circuit affirmed the district court's finding of contempt, and assessed against the appellant the costs of the appeal:

> The flagrant and contumacious character of the appellant's defiance of the court's orders makes it appropriate that appellee be reimbursed for items of expenses necessarily incurred on appeal to this Court in defending the adjudication of the District Court.

367 F.2d at 775.

Schauffler and *Crane* are indistinguishable from the present case and were properly relied upon by the Court of Appeals in its opinion below. The Court of Appeals also discussed with approval *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469 (7th Cir. 1984). In that case, the court awarded appellate fees and expenses incurred in defending the district court's imposition of sanctions against plaintiffs' counsel under Fed. R. Civ. P. 37(b). *Id.* at 745. Although *Tamari*, like numerous other recent cases,[18] relied on a statutory exception to

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[17] The Court stated in *Toledo Scale*, 261 U.S. at 428:

> "The degree of punishment for contempt in such case is in the discretion of the court whose dignity has been offended and whose process has been obstructed."

[18] *See, e.g., Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977); *Bugg v. International Union of*

the American Rule to award attorneys' fees on appeal, the court below ruled that there is "no principled basis for distinguishing between common law and statutory exceptions to the American Rule." [19] The Petitioners concede that this is so.[20] Thus, the entire body of case law addressing the award of attorneys' fees on appeal stands against their position.

The Court of Appeals' conclusion is supported not only by the case law, but also by important public policy considerations. An award of fees is often required to compensate fully the party proving the contempt. The imposition of attorneys' fees and expenses for the successful defense of a contempt order is fully consistent with this restorative purpose. These costs flow solely and directly from the contemnors' contumacious actions and their unsuccessful efforts to avoid the consequences of those actions. Failure to award appellate expenses substantially diminishes the value of the award made in the lower court, creating a disincentive for seeking sanctions and frustrating the very purpose of the award. *See Tamari*, 729 F.2d at 475; *Mickwee v. Hsu*, 753 F.2d 770 (9th Cir. 1985).

Petitioners pursued two unsuccessful appeals after the Bankruptcy Court held them in contempt. Craig brought their contumacious conduct to the attention of the Bankruptcy Court and twice defended the court order. The Court of Appeals' conclusion that Petitioners should bear the costs of their meritless appeals is wholly consistent with the decisions of the courts and with the purpose of civil contempt sanctions.

Allied Indus. Workers, 674 F.2d 595 (7th Cir.), *cert. denied* and *appeal dismissed*, 459 U.S. 805 (1982); *Marks v. Prattco, Inc.*, 633 F.2d 1122 (5th Cir. 1981).

[19] Appendix C, p. 11C.

[20] Petition, p. 10.

II. THE COURT OF APPEALS CORRECTLY HELD THAT JUDGE BARE WAS NOT REQUIRED TO RECUSE HIMSELF

Petitioners also contend that Bankruptcy Judge Bare should have recused himself from ruling on Craig's motion for attorneys' fees. The Court of Appeals' rejection of this argument was amply supported by the applicable law and by its review of the record before it.

The court below concluded that, under 28 U.S.C. § 144,[21] an affidavit alleging bias in support of a motion for recusal must be "sufficient." Mere assertions of a conclusionary nature, according to the court, do not meet this standard. Petitioners do not dispute the "sufficiency" requirement. Citing numerous cases,[22] the court went on to hold that judicial disqualification under Section 144 and 28 U.S.C. § 455 must be predicated upon extrajudicial conduct rather than upon judicial conduct.[23] Although Petitioners (citing no authority) challenge this

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[21] 28 U.S.C. § 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

[22] *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983); *Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980).

[23] 28 U.S.C. § 455 provides, in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

conclusion, their challenge is confined to the assertion that the language of Section 455 does not contain the qualification of extrajudicial conduct. Petitioners are apparently of the view that courts have no business interpreting the meaning of statutes. The reason for the qualification, of course, is that a judge's impartiality may reasonably be doubted only when the litigant's conduct crosses the line from normal judicial process to the personal realm.[24]

Applying these standards to the record before it, the Court of Appeals concluded that Petitioners had not come forward with a single fact which would lead a reasonable person to doubt the imparitality of Judge Bare. The affidavit in question consisted solely of speculation, and failed to allege one extrajudicial incident giving the appearance of bias or warranting recusal. Moreover, the court found that Petitioners' actions were not insulting or personally directed at Judge Bare. A judge can be disqualified on these grounds, as the court observed, only when the contumacious actions sink to the level of "personal vilification and scurrilous attacks."[25] Given the circumstances, Judge Bare's decision not to recuse himself—and the Court of Appeals' endorsement of that decision—was unquestionably proper.[26]

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[24] Thus, as the Court of Appeals stated (Appendix C, p. 7C): "The judge's impression of perceptions based upon information gained during the trial cannot be the basis of an allegation of bias." *See In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 164 (6th Cir. 1984); *United States v. Porter*, 701 F.2d 1158, 1166 (6th Cir.), *cert. denied*, 464 U.S. 1007 (1983); *In re Parr*, 13 B.R. 1010, 1018 (E.D.N.Y. 1981).

[25] Appendix C, p. 8C, *citing Farmer v. Strickland*, 652 F.2d 427, 438 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

[26] Petitioners assert that Judge Bare previously recused himself in a separate case involving the Petitioners. Petition, p. 12. It is impossible to discern from Petitioners' reference the reason for Judge Bare's recusal. In any event, Petitioners made the same

The Petitioners cite *Mayberry v. Pennsylvania*, 400 U.S. 455 (1974), for the proposition that due process demands that an "impartial judge" (i.e. other than the judge issuing the contempt order) define the punishment for contempt. Petition at 12. This is a total misapplication of the holding of *Mayberry*. *Mayberry* involved precisely the kind of "extrajudicial" incidents warranting recusal and not present here—personal attacks on the integrity of the judge.

Additionally, the Petitioners misinterpret *United States v. Meyer*, 462 F.2d 827 (3d Cir. 1972). *Meyer* discussed policies justifying summary contempt proceedings before a trial judge, *id.* at 831, rather than exceptions to the *Mayberry* standard. What bearing, if any, it has here is difficult to comprehend.

Finally, the Court of Appeals emphasized that the district court had conducted a *de novo* review of both Judge Bare's contempt order and his order assessing attorneys' fees.[27] This *de novo* review eliminates any possible argument favoring recusal. There has been no argument from Petitioners, as the Court of Appeals pointedly observed,[28] that the District Court was biased against Petitioners as well.

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argument to the District Court, which conducted a *de novo* review and found "no facts alleged which would 'convince a reasonable man that a bias exists.'" Appendix B, p. 6B.

[27] Appendix C, p. 8C.

[28] *Id.*

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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